

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION ONE  
April 7, 2008

**D050541      Mesdaq v. Centre City Development Corporation**

Upon written request filed by appellant, the appeal is DISMISSED and the remittitur is ordered to issue immediately. (Cal. Rules of Court, rule 8.244(c)(2)).

**D049794      People v. Alarid**

The petition for rehearing is denied.

**D049861      Great Western Drywall, Inc. v. Interstate Fire & Casualty Company**

The opinion filed March 12, 2008, is ordered certified for publication.

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION ONE  
April 8, 2008

**D052264      In re Jerry G., a Juvenile**

The appeal is dismissed. Nares, Acting P.J.; We Concur: Aaron, J., Irion, J.

**D050019      People v. Lessie**

The judgment is affirmed. CERTIFIED FOR PUBLICATION. Huffman, Acting P.J.;  
We Concur: McDonald, J., McIntyre, J.

**D051938      In re Tyler B., a Juvenile**

Upon filing an abandonment of appeal, personally signed by the defendant, the appeal is dismissed and the remittitur is ordered to issue immediately.

**D051536      Del Mar Union School District v. Kerckhoff**

Appellant has failed to file a brief after notice given pursuant to California Rules of Court, rule 8.220(a). The appeal is dismissed.

**D049638      Sourcinglink.Net, Inc. v. Carrefour S.A.**

The judgment is affirmed. Respondent is entitled to its costs on appeal. McIntyre, J.;  
We Concur: Benke, Acting P.J., Huffman, J.

**D049436      Longs Drug Stores v. Schwab**

The petition for rehearing is denied.

**D051554      Larson et al. v. Casual Male Stores, LLC**

**D052185      Larson et al. v. Casual Male Stores, LLC**

Respondents Ashley Larson et al's unopposed motion to consolidate the above-entitled appeals is GRANTED. All future filings will be under D051554. The parties will follow the joint briefing sequence submitted on October 12, 2007, and adopted by the court on October 16, 2007. Respondents' brief remains due on or before April 16, 2008.

**D051887      In re Faith S. et al., Juveniles**

The judgments are affirmed. McConnell, P.J.; We Concur: McDonald, J., Aaron, J.

**D052774      RBF Consulting, Inc. v. Superior Court of County of Imperial/San Diego  
Community College District et al.**

All trial court proceedings are stayed pending further order of this court.  
Real parties are directed to file a response to the petition on or before April 18, 2008.

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April 9, 2008

**D051661      People v. Lewis**

The judgment is affirmed. McConnell, P.J.; We Concur: Huffman, J., Nares, J.

**D051212      In re Ubaldo V., a Juvenile**

The judgment is affirmed. Huffman, J.; We Concur: Benke, Acting P.J., Irion, J.

**D051789      People v. Gray**

The judgment is affirmed. Nares, Acting P.J.; We Concur: Haller, J., Irion, J.

**D051463      In re Isabella M., a Juvenile**

The judgment is affirmed. McConnell, P.J.; We Concur: Huffman, J., Haller, J.

**D052393      Mayra M. v. Superior Court of Imperial County/Imperial County  
Department of Social Services**

The petition is denied. The request for stay is denied. Nares, J.; We Concur: Huffman, Acting P.J., Haller, J.

**D050225      Bou-Malham v. Farmers Insurance Exchange**

The judgment is affirmed. Respondents shall recover their costs on appeal. Nares, J.; We Concur: McConnell, P.J., O'Rourke, J.

**D051796      In re Kailey M., a Juvenile**

The custody order, the order setting forth the visitation schedule, the restraining order as modified to exclude Kailey as a protected person, and the order terminating dependency jurisdiction are affirmed. The case is remanded to the family court to resolve the unclear matters set forth in this opinion. McDonald, Acting P.J.; We Concur: O'Rourke, J., Aaron, J.

**D052369      Washington v. Superior Court of Imperial County/People**

The petition is denied.

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
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April 9, 2008 (Continued)

**D052224      In re Salceda on Habeas Corpus**

The petition for writ of habeas corpus has been read and considered by Justices Nares, McDonald and Irion. We take judicial notice of petitioner's prior direct appeals, Nos. D025258 and D029086, and prior habeas petitions denied by this court, Nos. D041226, D041639, and D048000.

A jury convicted petitioner in 1995 of kidnapping and exhibiting a deadly weapon. In a bifurcated trial, the court found petitioner had three strike priors, two serious felony priors, and had served one prior prison term. Petitioner was sentenced to state prison for a term of 35 years to life.

Petitioner appealed in No. D025258, and we remanded the case for consideration of a motion to strike petitioner's strike priors. On remand, the trial court struck two of petitioner's strikes and sentenced him to a determinate term of 26 years in state prison. Petitioner again appealed, and this court affirmed the judgment in No. D029086.

Thereafter, petitioner filed a series of habeas petitions in the trial court, and at least three habeas petitions in this court, all of which were denied. Petitioner then filed the instant petition arguing the following: (1) trial counsel was ineffective because he was representing petitioner under a conflict of interest; and (2) appellate counsel was ineffective on petitioner's direct appeals.

Petitioner concedes he was aware of trial counsel's purported conflict of interest during counsel's representation of petitioner in 1995. Likewise, petitioner was aware of the quality of appellate counsel's representation at the latest when this court affirmed petitioner's second appeal in 1998. The instant petition, filed over 13 years after petitioner was aware of his claim against trial counsel, and 10 years after he was aware of his claim against appellate counsel, is untimely. (*In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; *In re Clark* (1993) 5 Cal.4th 750, 797-798; *In re Bower* (1985) 38 Cal.3d 865, 873, fn. 3.) Petitioner's excuse for the delay in bringing this petition is he recently discovered the claims while researching his federal habeas corpus petition in September 2007, and he is merely presenting the instant claims to exhaust state court remedies. Petitioner also contends he is ignorant of the law and lacked the capacity to represent himself, and that prison lockdowns, health considerations, his divorce, prison overcrowding, an inadequate law library, his job and vocational classes contributed to the delay. This is insufficient to establish good cause for the significant delay of over a decade here, or to establish an exception to the procedural bar. (*In re Robbins, supra*, 18 Cal. 4th 770, 814, fn. 34; *In re Streeter* (1967) 66 Cal.2d 47, 52 [ignorance of the law not sufficient to excuse delay in filing habeas petition]; *In re Barnett* (2003) 31 Cal.4th 466, 475 [no right to counsel on habeas corpus proceedings]; *In re Clark, supra*, 5 Cal.4th at pp. 797-798.)

Moreover, petitioner's excuses for the delay are belied by the fact that, despite all the alleged impediments interfering with his ability to file the instant petition, he was able to file numerous petitions in the trial court, and at least three prior petitions in this court. Petitioner provides no explanation as to why he could not have raised his claims in any one of the prior petitions. This is especially true for petition No. D041226, where petitioner raised ineffective assistance of counsel claims. The petition is therefore denied for the additional reason that it is successive. (*In re Clark, supra*, 5 Cal.4th at pp. 765, 767-768.) The petition is denied.

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April 9, 2008 (Continued)

**D051893      National Steel and Shipbuilding Company v. Superior Court of San Diego County/Godinez et al.**

The petition for writ of mandate, request for stay, letter of November 6, 2007, response and reply have been read and considered by Justices Nares, McDonald and Irion. The petition is denied. The application by the California Employment Law Council for leave to file a preliminary amicus curiae brief is denied as moot. The Clerk is directed to return the original amicus brief to counsel.

**D050461      People v. Guzman**

The judgment is affirmed. McDonald, J.; We Concur: Benke, Acting P.J., Haller, J.

**D052222      In re Cooper on Habeas Corpus**  
**The petition is denied.**

**D052532      Ferrante et al. v. The Superior Court of San Diego County/Dudenhoeffer**  
The petition is denied.

**D052041      In re Johnson on Habeas Corpus**  
The petition for rehearing is denied.

**D052221      In re Kashyap on Habeas Corpus**  
The petition is denied.

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April 9, 2008 (Continued)

**D052293      In re Soares on Habeas Corpus**

The petition for writ of habeas corpus has been read and considered by Presiding Justice McConnell and Associate Justices McDonald and Irion. We take judicial notice of petitioner's direct appeal, No. D049480.

A jury convicted petitioner of corporal injury to a spouse, residential burglary, vandalism, and attempting to make a criminal threat. Petitioner admitted a strike prior, a serious felony prior, and a prior prison term. On September 15, 2006, the court sentenced petitioner to state prison for 19 years, eight months, calculated as follows: the upper term of six years for burglary, doubled to 12 years because of the prior strike; one-third the middle term of three years (one year) for corporal injury, doubled to two years because of the prior strike; one-third the middle term of one year (four months) for the attempted criminal threat, doubled to eight months because of the prior strike; and five years for the serious felony prior. Petitioner appealed, and we affirmed the judgment on August 24, 2007, in No. D049480.

Petitioner filed the instant petition, contending the following: (1) the trial court erred in refusing petitioner's request to instruct the jury that a person cannot be convicted of burglarizing his own home; (2) the court erred in admitting evidence of prior acts pursuant to Evidence Code section 1109 and giving the corresponding jury instructions (Judicial Council of Cal. Crim. Jury Instns. (2006-2007) CALCRIM Nos. 224, 375, 852); (3) the court's imposition of the upper term and consecutive sentences violates *Cunningham v. California* (2007) 549 U.S. \_\_\_, 127 S.Ct. 856 (*Cunningham*); and (4) ineffective assistance of counsel for failing to investigate whether prosecution witnesses tampered with the crime scene.

Petitioner's first issue, regarding the failure to instruct on burglarizing one's own home, and the third issue, alleging error under *Cunningham*, were raised and rejected on direct appeal. (See *People v. Soares* (Aug. 24, 2007, D049480) [nonpub. opn.].) These issues are therefore denied as repetitive. (*In re Clark* (1993) 5 Cal.4th 750, 765, 767-768; *In re Harris* (1993) 5 Cal.4th 813, 828-829.)

Petitioner's second issue, regarding the trial court's admission of prior acts evidence, is also procedurally barred because it could have been raised on direct appeal. (*In re Clark, supra*, 5 Cal.4th 750, 765, 767-768; *In re Harris, supra*, 5 Cal.4th 813, 829.)

Petitioner's fourth issue, although cloaked as a claim of ineffective assistance of counsel, is merely a factual attack on the testimony and evidence before the jury. Petitioner attaches several photographs that he claims demonstrate the crime scene was altered by some of the witnesses. Petitioner indicates these photos were before the jury, and he testified the crime scene did not look as it had been depicted in the photos. The jury had this evidence before it and heard petitioner's testimony, resolved whatever discrepancies may have existed, and found petitioner guilty. Petitioner may not retry the case on habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.) To the extent petitioner alleges these inconsistencies were not fully borne out at trial, petitioner may not raise those factual discrepancies here for the first time. (*Ibid.*) Moreover, although it is not this court's province to reweigh the evidence, we conclude the photographs do not establish a prima facie case that counsel was ineffective in failing to investigate how the room was photographed and whether the crime scene was altered. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

The petition is denied.

**D050736      O'Leary et al. v. California Department of Fish and Game**

The petition for rehearing is denied.

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April 9, 2008 (Continued)

**D052588      In re Washington on Habeas Corpus**

The petition is denied as incomplete and duplicative.

**D052447      CC-La Jolla Inc., et al. v. Superior Court of San Diego County/Short et al.**

The request to augment the record is denied. The petition is denied.

**D052745      In re Parker on Habeas Corpus**

The petition is denied.

**D052275      In re Miller on Habeas Corpus**

The petition is denied.

**D048306      People v. Leon**

The petition for rehearing is denied.

**D051772      In re Haugen on Habeas Corpus**

For good cause shown, respondent is ordered to show cause why the relief requested should not be granted.

The Clerk of the Court is directed to provide Appellate Defenders, Inc. with copies of the petition, informal response and reply. Appellant Defenders is directed to submit, within 10 court days, a recommendation for counsel to represent petitioner in this matter.

Within 30 days after appointment of counsel, petitioner is directed to file a supplemental petition.

Respondent may file a return within 30 days after the supplemental petition is filed. Petitioner may file a traverse within 20 days after the return is filed.

Absent a request by the parties within 10 days after the return is filed, oral argument will be deemed waived. If a party requests oral argument, the request should be in letter form with proof of service on the other parties. The letter should also identify the focus of the party's argument and the amount of time requested, not to exceed 15 minutes.

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**D052701      Trucchi et al. v. The Superior Court of San Diego County/Carus et al.**  
The petition is denied.

**D050693      Gonzalez v. Luzaich Striping Inc., et al.**

We affirm the judgment in part and reverse in part. Triable issues of fact exist with respect to Gonzalez's claims of race discrimination under FEHA, the common law, the California Constitution, and the UCL; we therefore reverse the trial court's grant of summary adjudication on those causes of action. We also reverse the trial court's grant of summary adjudication in LSI's favor on Gonzalez's cause of action for a violation of Labor Code section 201. We affirm the trial court's grant of summary adjudication as to the other causes of action Gonzalez raises in this appeal.

The case is remanded to the trial court for further proceedings with regard to Gonzalez's causes of action alleging violations of FEHA, the common law, the California Constitution, and the UCL on the basis of race discrimination, as well as Gonzalez's cause of action pursuant to Labor Code sections 201 and 203.

The parties are to bear their own costs on appeal. Aaron, J.; We Concur: O'Rourke, Acting P.J., Irion, J.

**D052706      Taylor v. Superior Court of San Diego County/People**  
The petition is denied.

**D045154      Buell-Wilson et al. v. Ford Motor Company**

**D045579      Buell-Wilson et al. v. Ford Motor Company**

It is ordered that the opinion filed herein on March 10, 2008, is modified.  
Appellants' petition for rehearing is denied.

**D052737      In re Berryman on Habeas Corpus**

The petition for writ of habeas corpus has been read and considered by Presiding Justice McConnell and Associate Justices McDonald and Irion.

"[B]oth trial and appellate courts have jurisdiction over habeas corpus petitions, but a reviewing court has discretion to deny without prejudice a habeas corpus petition that was not filed first in a proper lower court." (*In re Steele* (2004) 32 Cal.4th 682, 692.) Berryman concedes he has not filed a petition on these issues in any other court. The petition is denied without prejudice to refile in Imperial County Superior Court, 939 West Main Street, El Centro, CA 92243.

The clerk is directed to retain one copy of the petition for our files and to return the original and all other copies to Berryman so he may file them in the superior court.



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April 10, 2008 (Continued)

**D052703      In re Haulcy on Habeas Corpus**

The petition for a writ of habeas corpus is treated as a motion for constructive notice of appeal. The motion has been read and considered by Presiding Justice McConnell and Associate Justices McDonald and Irion. We take judicial notice of San Diego Superior Court file SCN225966. The motion is denied.

**D051537      American Interbanc Mortgage, LLC v. E-Lenders Report Card Inc., et al.**

Upon written request filed by appellant, the appeal is dismissed and the remittitur is ordered to issue immediately.

**D052058      Friedman et al. v. Marshall**

Upon written request filed by appellants, the appeal is dismissed and the remittitur is ordered to issue immediately.

**D052590      White v. Superior Court of San Diego County/Medical Board of the State of California**

The petition is denied.

**D052233      In re Padilla on Habeas Corpus**

The petition for writ of habeas corpus filed December 27, 2007, and supplement filed February 25, 2008, have been read and considered by Presiding Justice McConnell and Associate Justices McDonald and Irion. We take judicial notice of San Diego County Superior Court file No. SCE253917, and direct appeal No. D049522.

A jury convicted petitioner of robbery and possession of a controlled substance, and found true that he personally used a firearm in the commission of the robbery. The court sentenced petitioner to 13 years in prison. We affirmed the judgment in No.D049522 on December 27, 2007.

Petitioner filed the instant petition on the same day we affirmed his conviction. A review of the superior court file reveals the petition has not been presented to the trial court. Thus, although we have original jurisdiction over habeas petitions, we deny without prejudice to refile in the trial court in the first instance. (See *In re Steele* (2004) 32 Cal.4th 682, 692; *In re Hillery* (1962) 202 Cal.App.2d 293, 294.)

The petition is denied.

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**D051499      In re Joshua G. et al., a Juvenile**

The judgments are affirmed. Aaron, J.; We Concur: McIntyre, Acting P.J., Irion, J.

**D049577      Arko v. Buckner et al.,**

The judgment is affirmed. Parties to bear their own costs on appeal. Haller, J.;  
We Concur: Benke, Acting P.J., Huffman, J.

**D052248      In re Walton on Habeas Corpus**

The petition is denied.

**D052633      Juana V. v. Superior Court of San Diego County/San Diego County Health  
and Human Services Agency**

The attorney for petitioner Juana V. has notified the court that a petition for writ of mandate under California Rules of Court, rules 8.452 and 5.600 will not be filed as there are no viable issues for writ review. The case is DISMISSED.

**D052011      In re Orozco on Habeas Corpus**

For good cause shown, respondent is ordered to show cause why the relief requested should not be granted. Absent objection on or before April 22, 2008, the response and reply will be deemed the return and traverse to the order to show cause.

Absent a request by the parties on or before April 30, 2008, oral argument will be deemed waived. If a party requests oral argument, the request should be in letter form with proof of service on the other parties. The letter should also identify the focus of the party's argument and the amount of time requested, not to exceed 15 minutes.

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
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April 11, 2008 (Continued)

**D052277      In re Hoag on Habeas Corpus**

The petition for writ of habeas corpus has been read and considered by Presiding Justice McConnell and Associate Justices Nares and McDonald.

Petitioner Randolph Hoag is a life prisoner currently housed at Calipatria State Prison.

Apparently, he has little income aside from a small amount he receives monthly from his prison job.

Each week, an indigent inmate may request and receive supplies and postage for up to five one-ounce letters. (Cal. Code Regs., tit. 15, § 3134.) An "indigent inmate" is defined as "an inmate who is wholly without funds at the time they were eligible for withdrawal of funds for canteen purchases." (Cal. Code Regs., tit. 15, § 3000.)

In July 2006, Hoag requested and received metered envelopes under the above regulations.

However, when he attempted to use the envelopes, prison officials would not allow him to do so because, between the time he received the envelopes and the time he attempted to use them, his wages from his prison job had been deposited into his inmate trust account. Prison officials based their decision upon section 54010.5 of the Department of Corrections and Rehabilitation Operations Manual (DOM), which also permits an indigent inmate to receive postage and supplies, but defines an "indigent inmate" as "one who is without funds at the time the material is submitted for mailing and remains without funds for 30 days after the documents are mailed."

After exhausting his administrative remedies and attempting to seek relief from the Imperial County Superior Court, Hoag filed this petition requesting that this court declare the DOM provision to be invalid because it is an underground regulation and it conflicts with the definition of "indigent inmate" contained in the California Code of Regulations. While Hoag was pursuing the above remedies, the Department of Corrections and Rehabilitation (Department) initiated a rulemaking action to revise the provisions for inmate mail contained in the California Code of Regulations. (Cal. Reg. Notice Register 2007, No. 12-Z, p. 518

<<http://www.oal.ca.gov/pdfs/notice/12z-2007.pdf>>.) Among the proposed revisions is a change to the definition of "indigent inmate." The proposed new definition for "indigent inmate" is an "an inmate who has \$1.00 or less in their Inmate Trust Account for 30 consecutive days." (See Dept. of Corrections and Rehabilitation, *Notice of Change to Text as Originally Proposed and Documents Added to the Rulemaking File and Text of Proposed Regulations* (Jan. 31, 2008)<[http://www.cdcr.ca.gov/Regulations/Adult\\_Operations/Pending\\_Rules\\_Page.html](http://www.cdcr.ca.gov/Regulations/Adult_Operations/Pending_Rules_Page.html)> [as of April 10, 2008].)

Because the public comment period for the proposed revisions closed on February 18, 2008 (*id.*) and because the Department has the ability to adopt and implement regulations on an expedited basis (Pen. Code, § 5058.3), the adoption and implementation of the proposed revisions appears to be imminent. If the revised regulations are adopted and implemented substantially as proposed, the revised regulations will moot Hoag's petition. Accordingly, the petition is denied without prejudice to being refiled if the proposed revisions are not adopted and implemented as anticipated.

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April 11, 2008 (Continued)

**D052834      Amber A. v. Superior Court of San Diego County/San Diego County  
Department of Health and Human Services Agency**

The petition for writ of mandate and request for stay have been read and considered by Presiding Justice McConnell and Associate Justices McDonald and Irion. The petition is denied.

**D052818      Best v. Superior Court of San Diego County/Russell et al.**

The petition for writ of mandate has been read and considered by Presiding Justice McConnell and Associate Justices Nares and McDonald. The petition is denied.